Tan Siew Chin Sdn Bhd v Perbadanan Pengurusan Sri Pantai

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)-2681–10 OF 2011
ABU SAMAH, MOHD HISHAMUDIN AND BALIA YUSOF JJCA
26 DECEMBER 2012

Civil Procedure — Summons in chambers — Application for interlocutory orders in chambers — Preliminary determination on questions of law by court — Claim struck out for disclosing no cause of action — Further order by court granting liberty to file fresh proceedings based on any other cause of action — Whether judge erred in making further order — Principle of res judicata — Rules of the High Court 1980 O 14A

The respondent was the management corporation of Gurney Beach Resort Condominium ('Gurney Beach Condominium') while the appellant was the original owner of the land on which Gurney Beach Condominium was built ('condominium land'). The developer of the Gurney Beach Condominium, Gurney Resorts Corp Sdn Bhd ('GR Corp') and the appellant had entered into a joint venture agreement ('the JVA') to build the Gurney Beach Condominium on the condominium land. A supplemental agreement was executed to vary some of the terms of the JVA. Under the joint venture agreements, the appellant agreed to transfer the Condominium land to GR Corp and, in return, GR Corp agreed to construct the Gurney Beach Condominium at its own costs and expense and to transfer 48 units of apartments in the Gurney Beach Condominium to the appellant ('the appellant's units'). Nowhere under the joint venture agreements did it state that the appellant was obliged to pay GR Corp service charges for the appellant's units from the time vacant possession of the appellant's units was given to the appellant until the establishment of the management corporation. The respondent claimed against the appellant for the alleged service charges owing in the sum of RM2,530,229.02. In the High Court, the appellant took out a summons in chambers under O 14A of the Rules of the High Court 1980 and the learned High Court judge allowed the appellant's O 14A application and ordered that the respondent's claim against the appellant be struck out for disclosing no reasonable cause of action. The learned judge also made a further order that the respondent be granted liberty to file fresh proceedings based on any other cause of action against the appellant relating to the alleged service charges as claimed by the respondent in the action. The present appeal was limited to that part of the decision of the learned High Court judge in allowing the respondent liberty to file fresh proceedings against the appellant in relation the alleged service charges.

Held, allowing the appeal with costs:
The learned judge had erred by making such a ruling. The doctrine of res judicata is not confined only to causes of action or issues in respect of which the court is actually asked to decide or has already decided. The doctrine also extends to all other causes of action or issues which should have been litigated or asserted in the original earlier action, but were not brought forward deliberately or due to inadvertence or negligence resulting in the final judgment, and that it would be an abuse of process to allow a party to bring new proceeding to be started in respect of them (see para 21). *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 referred.

[Bahasa Malaysia summary

Responden adalah perbadanan pengurusan Gurney Beach Resort Condominium ('Gurney Beach Condominium') sementara perayu adalah pemilik asal tanah di mana Gurney Beach Condominium dibina ('tanah kondominium'). Pemaju Gurney Beach Condominium, Gurney Resorts Corp Sdn Bhd ('GR Corp') dan perayu telah menandatangani perjanjian usaha sama ('JVA') untuk membina Gurney Beach Condominium di atas tanah kondominium tersebut. Perjanjian tambahan dilaksanakan untuk mempelbagaikan beberapa terma JVA tersebut. Di bawah perjanjian-perjanjian usaha sama tersebut, perayu bersetuju untuk memindahkan tanah kondominium kepada GR Corp dan, atas pulangannya GR Corp bersetuju untuk membina Gurney Beach Condominium atas kos dan pembelanjaannya sendiri dan untuk memindahkan 48 unit pangsapuri di Gurney Beach Condominium kepada perayu ('unit-unit perayu'). Tidak dinyatakan di mana-mana pun di bawah perjanjian-perjanjian usaha sama menyatakan bahawa perayu bertanggungjawab untuk membayar GR Corp untuk caj-caj perkhidmatan untuk unit-unit perayu dari masa milikan kosong unit-unit perayu diberikan sehingga penubuhan perbadanan pengurusan tersebut. Responden mendakwa terhadap perayu untuk caj-caj perkhidmatan yang belum dibayar sejumlah RM2,530,229.02. Di Mahkamah Tinggi, perayu memasukkan saman dalam kamar di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 dan hakim Mahkamah Tinggi yang bijaksana membenarkan permohonan A14A perayu dan memerintahkan tuntutan responden terhadap perayu dibatalkan kerana tidak mengemukakan kausa tindakan yang munasabah. Hakim yang bijaksana juga membuat perintah lanjut bahawa responden diberikan kebebasan untuk memfailkan prosiding baru berdasarkan atas apa-apa kausa tindakan lain terhadap perayu berkaitan caj-caj perkhidmatan tersebut seperti yang dituntut oleh responden di dalam tindakan. Rayuan ini dihadkan kepada bahagian keputusan tersebut oleh hakim Mahkamah Tinggi yang bijaksana dalam membenarkan responden kebebasan memfailkan prosiding baru terhadap perayu berkaitan caj-caj perkhidmatan yang didakwa tersebut.

Diputuskan, membenarkan rayuan dengan kos:

Hakim yang bijaksana tersilap dengan membuat perintah sedemikian. Doktrin res judicata bukan sahaja terbatas kepada kausa-kausa tindakan atau isu-isu berkaitan di mana mahkamah sebenarnya diminta memutuskan atau telah memutuskan. Doktrin juga dilanjutkan kepada kesemua kausa-kausa tindakan yang lain atau isu-isu yang patut dilitigasikan atau ditegaskan di dalam tindakan awal asal, tetapi tidak dibawa ke hadapan dengan sengaja atau kerana ketidaksengajaan atau kecuaian akibat penghakiman muktamad, dan bahawa ia akan menjadi penyalahgunaan proses untuk membenarkan pihak membawa prosiding baru untuk dimulakan berkaitan perkara tersebut (lihat perenggan 21). *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 dirujuk.]

Notes

For a case in application for interlocutory order in chambers, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) para 9186.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 14A
Strata Titles Act 1985

Appeal from: Civil Suit No 22NCVC–137 of 2011 (High Court, Pulau Pinang)

Lim Hock Siang (Presgrave & Matthews) for the appellant.
Daphne Choy (Choy & Associates) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal is against the decision of the High Court of Malaya, Penang, a decision delivered on 28 September 2011.

[2] On 27 February 2012 we unanimously allowed the appeal with costs.

[3] We now give our grounds for allowing the appeal.

[4] The decision of the High Court was on an interlocutory matter — a summons in chambers application (encl 6) of the appellant (the defendant before the High Court) pursuant to O 14A of the Rules of the High Court 1980; for the High Court to make a preliminary determination on certain questions of law, without the necessity of proceeding to trial; that would dispose off the action one way or other.

[5] In order to understand the respondent's claim against the appellant, we have to allude to the background facts. Briefly, they are as follows. A

[6] The respondent is the management corporation of a condominium known as 'Gurney Beach Resort Condominium' (which shall be referred to in this judgment as the 'Gurney Beach Condominium'). B

[7] The respondent was established on 21 November 2007 pursuant to the Strata Titles Act 1985.

C

[8] The appellant was the original owner of the land on which Gurney Beach Condominium is built (in this judgment we will be referring to this land as the 'condominium land').

[9] The developer of the Gurney Beach Condominium is a company called 'Gurney Resorts Corporation Sdn Bhd' (in this judgment, this company will be referred to as 'GR Corp'). D

[10] On 19 May 1995, the appellant and GR Corp entered into a joint venture agreement (the 'JVA') to build the Gurney Beach Condominium on the condominium land. Subsequently, a supplemental agreement dated 21 June 1996 was executed to vary some of the terms of the JVA. For convenience, we will be referring to these two agreements collectively as the 'joint venture agreements'. E

F

[11] The essence of the joint venture agreements was that the appellant agreed to the transferring of the condominium land to GR Corp; and, in return, GR Corp agreed to construct the Gurney Beach Condominium at its own costs and expense, and, thereafter, to transfer 48 units of apartments in the Gurney Beach Condominium to the appellant (these 48 units will be referred to in this judgment as 'the appellant's units'). G

[12] There is no provision in the joint venture agreements that stipulates that the appellant was under an obligation to pay GR Corp service charges in respect of the appellant's units from the time vacant possession of the appellant's units was given to the appellant until the establishment of the management corporation. H

[13] GR Corporation completed the construction of the Gurney Beach Condominium sometime in October 1998. I

[14] In its statement of claim, the respondent seeks to claim against the appellant service charges (allegedly) owing prior to the establishment of the

respondent totaling RM2,530,229.02. It is alleged that the appellant had executed sale and purchase agreements and deeds of mutual covenants with the developer in respect of the appellant's units; and that the appellant is liable to pay the developer maintenance or service charges for each of the appellant's units. It is also alleged that prior to the incorporation of the respondent on 21 November 2007, the appellant owed the developer maintenance or service charges for a period of ten years from October 1998–July 2007 amounting to RM2,530,229.02. It is further alleged that the developer had allegedly assigned the alleged debt to the respondent with effect from 1 August 2007.

[15] The main thrust of the appellant's defence is as follows:

(a) the appellant had never executed any sale and purchase agreement or any deed of mutual covenants with the developer in respect of the appellant's units;

(b) the only agreements entered into between the appellant and the developer are the joint venture agreements;

(c) there is no express provision under the joint venture agreements requiring the appellant to pay the developer maintenance or service charges in respect of the appellant's units; and

(d) therefore, the developer could not have any right to impose maintenance or service charges on the appellant, and it follows that there is no debt owing by the appellant to the developer which the latter could in turn assign to the respondent.

[16] On 7 June 2011, the appellant took out a summons in chambers pursuant to O 14A of the Rules of the High Court 1980 for, inter alia:

(a) the following questions of law be determined without the need for the full trial of the action, namely:

(i) whether, in the absence of any sale and purchase agreement and/or deed of mutual covenants entered into between the appellant and the developer, GR Corp Sdn Bhd, imposing an obligation on the appellant to pay to GR Corp maintenance or service charges for each of the appellant's units for the purposes of maintaining and managing the common properties of Gurney Beach Condominium, the appellant is under no legal obligation to pay either GR Corp or the respondent for any maintenance or service charges from the time the construction of the condominium was completed in October 1998 to the time when the management of the condominium was taken over by the respondent in July 2007;

(ii) whether, in the absence of any provision in the joint venture agreements imposing an obligation on the appellant to pay to GR

Corp maintenance or service charges for each of the appellant's units in the condominium for the purposes of maintaining and managing the common properties of the Gurney Beach Condominium, the appellant is under no legal obligation to pay either GR Corp or the respondent any maintenance or service charges from the time the construction of the condominium was completed in October 1998 to the time when the management of the condominium was taken over by the respondent in July 2007; and

(iii) if the answer to (i) and (ii) above is in the affirmative, whether the matters pleaded in the statement of claim disclose a cause of action against the appellant.

[17] The learned High Court judge answered questions (1)(i)–(ii) above in the affirmative and question (iii) in the negative; and, accordingly, allowed the appellant's O 14A application. He ordered that the entire action relating to the respondent's claim against the appellant for service charges be struck out for disclosing no reasonable cause of action. However, the learned judge also made a further order to the effect that the respondent be granted liberty to file fresh proceedings based on any other cause of action against the appellant relating to the alleged service charges as claimed by the respondent in the action.

[18] The present appeal is limited to that part of the decision of the learned High Court judge in allowing the respondent liberty to file fresh proceedings against the appellant in relation the alleged service charges as claimed by the respondent in the action (and which had been struck out) 'based on any other cause of action'.

[19] The learned High Court judge, in his grounds of judgment, explained as to why he allowed the respondent 'liberty to file fresh proceedings … based on any other cause of action' in the following manner:

Liberty to File Fresh Proceedings — Reasons

13. The cause of action which was founded on the alleged existence of a 'sale and purchase agreement' or 'deed of mutual covenants' was obviously a *contractual* one and in the admitted absence of any such documents, namely, the 'fact material to the plaintiff succeeding in their claim', it meant that the suit on that ground only was no longer sustainable.

The question then to be considered was whether a withdrawal, discontinuance or a striking out of the suit in such circumstances would affect the right of the plaintiff to bring a claim for the same relief or remedy *based on any other cause of action*. I was of the view that the plaintiff could not be restricted from pursuing a similar claim based on any other valid or reasonable cause of action.

14. It is trite that the material facts to raise a claim valid in law, that is, a cause of action, could arise in the context of an alleged *'contract'* or *'tort'* or even based on a *statutory provision*. That then formed the 'factual' foundation for the redress sought. In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (at p 19) the Supreme Court defined 'cause of action' as:

> … a statement of facts alleging that a plaintiff's right, *either at law or by statute*, has in some way or another, been adversely affected or prejudiced by the act of the defendant in an action.

In *Indah Desa Saujana Corporation Sdn Bhd & 2 Ors v James Foong Cheng Yuen, Judge, High Court, Malaya & Anor* [2008] 2 MLJ 11; [2008] 2 AMR 6 (at p 21) the Court of Appeal referred and adopted the definition of a reasonable cause of action as stated by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 (at p 242) which was in the following words:

> A reasonable cause of action means simply a *factual situation the existence of which entitles* one person to obtain from the court a remedy against any other person.

15. If the plaintiff was to bring a fresh proceeding against the defendant on similar contractual facts or context, of course it would cause prejudice and disadvantage to the defendant. The court would not countenance any such move and the principle of res judicata could come to the aid of the defendant in any event.

What then amounts to a 'cause of action' is the factual situation giving rise or forming the basis of any claim for relief from the court. The relief or remedy sought could remain the same but the 'factual situation' could be different.

Therefore, it was my view, there was nothing in law or by way of policy to bar the plaintiff from bringing a fresh action for the same relief or remedy based on some other 'factual foundation' including any statutory provision or 'quasi-contract' or equitable scenario, so long as that fresh factual foundation had not been the subject of any previous litigation between the parties.

[20] Learned counsel for the appellant submitted that the learned judge erred in law in ruling that the striking out of the respondent's action against the appellant (pursuant to the O 14A application) did not bar the respondent from bringing a fresh action for the same relief or remedy based on 'other 'factual foundation'; citing the principle of res judicata.

[21] With respect, we agree with this submission that the learned judge had erred by making such a ruling. The doctrine of res judicata is not confined only to causes of action or issues in respect of which the court is actually asked to decide or has already decided. The doctrine also extends to all other causes of

action or issues which should have been litigated or asserted in the original earlier action, but were not brought forward deliberately or due to inadvertence or negligence resulting in the final judgment, and that it would be an abuse of process to allow a party to bring new proceeding to be started in respect of them. In this regard, we need only refer to the often-cited Supreme Court decision of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where the scope and width of the principles of res judicata have been comprehensively explained by Justice Peh Swee Chin FCJ. We feel it is unnecessary for us to repeat in our judgment those relevant passages of the judgment in that case.

[22] Appeal allowed with costs of RM5,000 to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor